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UNIFORMITY IN MARRIAGE AND DIVORCE LAWS.*

In order fully to appreciate the importance of uniformity in the marriage and divorce laws, we must glance at the present existing diversity, and even inconsistency therein. Blackstone's familiar recommendation to consider the old law, the mischief and the remedy, suggests a convenient and natural mode of presenting any proposed legal reform. To consider the subject of this paper somewhat in that order:

I. AS TO THE MARRIAGE LAWS.

1. As to the age of consent. It is well known that the Common Law rule as to the age of consent; viz., twelve in the female and fourteen in the male, still exists in many States —even in the older and presumably the more conservative and thoughtful communities.

It may seem singular that in the northern and colder climate of England the period of lawful marriage should be the same as that of the warmer continental countries, but it was perhaps introduced from the Civil Law. Even in Massachusetts, a commonwealth not backward in adopting every measure that

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may improve and elevate her people, and under whose glorious institutions it is a blessed privilege to live, the age of consent is still that above stated; and a marriage solemnized before a magistrate between two children above those ages respectively is legal and valid, even without consent of their parents or guardians; and this notwithstanding a statute of that State prohibits ministers or magistrates from solemnizing a marriage between persons of such age without such consent, under a heavy penalty; such prohibition being considered to apply only to the minister and not to the contract. Some years ago a young girl, only thirteen years of age, named Sarah Hervey, was enticed away from her widowed mother's house by a young fellow, named Parton, of bad character and dissolute habits, who by false representations as to the age of the girl, procured a marriage license, and persuaded a magistrate to formally marry them. She returned to the house of her mother, who forbade the young man to see her. Upon his petition against the mother for writ of habeas corpus, the Supreme Court of the commonwealth, after full consideration, ordered the young wife to be surrendered to the husband, and he bore her away in triumph: *Parton* v. *Hervey*, 1 Gray, 119 (1854). The mother then brought suit against a confederate of the husband, who had aided in enticing away the girl and in practicing the fraud upon the magistrate who solemnized the marriage, but the mother again failed in her efforts to vindicate her rights to protect her daughter, since it distinctly appeared that the marriage was with the daughter's full and free consent: *Hervey* v. *Moseley*, 7 Gray, 479 (1856).

If I am rightly informed, the same lamentable results might occur in many, if not in a majority of the United States. Not long since, two young girls, aged fourteen and sixteen, at a dancing party in Buffalo, met two youths, but little older than themselves, who, under the excitement of the occasion, proposed they should get married "just for the fun of the thing." They did so, and a few days later, the young wife came before a magistrate and obtained an order to commit her husband to jail, because of his refusal to support her.

To allow this most important of all relations in life to be

irrevocably entered into before the characters of the parties are formed, their tastes developed, or their judgment matured, before their natural fitness or unfitness for each other can possibly be predicted even by their most intimate friends, not only leads to many unhappy marriages, but sooner or later naturally lands the parties in the divorce court. Consequently many States, impressed with the dangers surrounding these precocious unions, have raised the marriageable age, some to sixteen in the female and eighteen in the male. But it is doubtful whether even this is adequate, and the new State, Washington, has advanced the age to eighteen and twenty-one respectively. Uniformity here and in the other essentials of marriage is not only desirable but imperative. Eighteen and twenty-one are none too high as a general rule, although under some unfortunate circumstances marriage at a less age seems the wisest thing.

2. As to the publication of banns, or obtaining of license. To prevent secret and clandestine marriages some means are all important. Publication of banns, as an essential prerequisite, is one of the best preventives ever adopted. It ought to be restored. The next best remedy is the filing of a previous application with the town-clerk, or some other officer, and obtaining from him an official certificate or license. Such application ought to contain the written consent of the parents or guardians of both parties, if they be under age; and be made so long prior to the time of the proposed marriage ceremony that friends and relatives may be informed thereof, and be allowed to interpose objections, if such exist.

Many States have no preventive or check against secret marriages, and substantial uniformity might well be adopted to secure such a safeguard. Some States now provide that parents and friends may intervene and make written objections to a magistrate, and have a public hearing on the fitness of the marriage, which may be then forbidden by the officer, if he sees fit.

3. As to the solemnization of the marriage. At present a majority of States hold valid the so-called Common Law marriage; *i. e.*, merely a private contract between the parties,

to consider themselves thenceforth as husband and wife; especially where such agreement is followed by cohabitation. This method of marriage requires no writing, no witness, no magistrate or minister, no publication, and no information to family, relatives, or friends. Could anything be fraught with more danger?

In most States the statutes declaring how marriages shall be solemnized are considered directory merely. A marriage according to the Common Law, without complying with such directions, is held valid, unless the statutes clearly and positively assert all other marriages to be null and void.

Thus, although the law of Pennsylvania declared "All marriages shall be solemnized by taking each other for husband and wife before twelve sufficient witnesses," it was still held that a marriage not in the presence of so many witnesses was not for that reason invalid: *Rodebaugh* v. *Sanks*, 2 Watts, 9 (1833).

So, in Missouri, it has always been considered that a Common Law marriage is good, though not in conformity to the statutory requirements, unless the statutes contain express words of nullity: *Dyer* v. *Brannock*, 66 Mo. 391; 27 Am. R. 359 (1877). And although the statute says, "Previous to any marriage in this State, a license for that purpose shall be obtained from the officer therein authorized to issue the same," nevertheless a marriage by consent in presence of witnesses is valid, without obtaining any license, and without any minister or officer being present: *State* v. *Bittick*, 103 Mo. 183 (1890).

The statute of Alabama uses still stronger language, declaring positively that "No marriage shall be solemnized without a license issued by the judge of probate of the county where the female resides," but the highest court of Alabama holds a marriage perfectly good without any license at all: *Campbell* v. *Gullatt*, 43 Ala. 57 (1869).

Kentucky, North Carolina, Georgia, Louisiana, New Hampshire, and other States, adopt similar constructions: *Stevenson* v. *Gray*, 17 B. Monroe, Ky. 193 (1856); *State* v. *Robbins*, 6 Iredell's N. C. Rep. 13 (1845); *Askew* v. *Dupree*, 30 Ga. 173

(1860); *Holmes* v. *Holmes*, 6 La. 463 (1833); *Londonderry* v. *Chester*, 2 N. H. 268 (1820).

In the Empire State, on whose banner floats that lofty word "Excelsior," it is familiar learning that the statutes requiring solemnization before a minister, priest, or magistrate in the presence of witnesses, are only directory, and for the purpose of securing registration; and that for all other purposes marriages are valid without such celebration and attestation. All the New York law requires is a competency to contract and an actual contract between the parties themselves: *Hayes* v. *The People*, 25 N. Y. 390 (1862).

A few years since, a widower, the father of several children, a few weeks after his wife's death, entered his seamstress's bedroom at night, and proposed to marry her, saying it would not answer to do so publicly, on account of the very recent death of his wife and the opposition of his family, but that it would be a perfectly lawful and valid marriage if they both then agreed to consider themselves as husband and wife. After some remonstrances she finally yielded. Unwilling to keep her longer in his own house, he sent her to another city, where she resided under an assumed name and had several children by him. Upon his death, some years afterwards, she set up a claim for herself and her children to a portion of his property, in common with the children of his first wife; and upon her testimony alone her claim was established, notwithstanding that his first wife's children offered to prove that their father had always denied that he had ever married again: *Van Tuyl* v. *Van Tuyl*, 57 Barb. 235 (1869); see, also, *Bissell* v. *Bissell*, 55 Barb. 325 (1869).

On the other hand, a few States have had the moral courage to adopt and declare a "higher law" on this subject, and hold that where a statute clearly declares how a marriage may be solemnized, it impliedly forbids a marriage in any materially different way, although such statute contains no express and positive prohibition or declaration of the invalidity of marriages solemnized otherwise than as the statute provides.

Tennessee seems entitled to the credit of first announcing and positively applying this doctrine. In 1829 the Supreme

Court of that State, in a very careful and elaborate opinion, decided that the statutory provisions as to how marriages might be solemnized superseded all Common Law marriages, and that a marriage solemnized before a justice of the peace out of his own county and where he had no authority, though formal and legal in other respects, was absolutely null and void: *Bashaw* v. *The State*, 1 Yerger, 177 (1829), and this was fully affirmed two years later in *Grisham* v. *The State*, 2 Yerg. 589 (1831).

The code of Maryland provides that the rites of marriage shall not be celebrated by any person within the State unless by some ordained minister, or in such manner as is used and practiced by the society of Quakers; also that no person shall marry within the State without first obtaining a license directed to a minister or other person qualified by law to celebrate a marriage in this State, nor until after banns published in some house of religious worship, or by a minister, as therein directed. It further prescribes a penalty upon parties going out of the State to marry contrary to the provisions of the act. But the statute contains no express prohibition or declaration of absolute nullity of marriages contracted otherwise than as therein provided. Under the existence of this law two respectable persons agreed to take each other as husband and wife. They lived publicly as such for several years, and were treated and reputed to be such among their friends and acquaintances. After the man's death the wife set up a claim to a share of his property, but it was held that the alleged marriage was null and void, and that to constitute a valid marriage in Maryland some religious ceremony must be superadded to the civil contract: *Denison* v. *Denison*, 35 Md. 361 (1871).

The statutes of Massachusetts enact (Pub. Sts. c. 145, § 22) that a marriage may be solemnized by a justice of the peace, or by a minister of the gospel ordained according to the usage of his denomination, etc., but nowhere expressly declare other marriages invalid. In 1879, a minister of the Second Advent denomination, at a public religious meeting in Worcester, at which about fifty persons were present, read a

few verses from Matt. xx., and a young lady in the congregation did the same, after which they joined hands, and declared that in the presence of God and these witnesses they took each other to be husband and wife, "till death do us part." There was no other ceremony or solemnization, and no magistrate or other minister was present as such, though a marriage license had been duly issued. Believing that they were thus lawfully married, the parties subsequently cohabited together as man and wife. Upon an indictment against the man for lewd and lascivious cohabitation, the marriage was held null and void in an exhaustive opinion by Chief Justice Gray, although the conviction was set aside on another point: *Commonwealth* v. *Munson*, 127 Mass. 459 (1879). The same view had previously been taken in England: *Beamish* v. *Beamish*, 9 H. L. C. 274 (1861). And see *Norcross* v. *Norcross*, 155 Mass. 425 (1892).

The statute of West Virginia (Code of 1868, c. 63) provides for the issuing of a license, the persons by whom and the manner in which marriages may be solemnized. It further declares that marriages shall not be void if celebrated without a license, nor if in good faith solemnized before a person professing to be authorized, though not so; but it contains no other saving clauses. Under this act it was recently held that a Common Law marriage, by mutual consent, without any license and without solemnization before any officer either *de jure* or *de facto* was not valid: *Beverlin* v. *Beverlin*, 29 W. Va. 732 (1887).

In the new State of Washington, it is also held that the statutes directing how marriages may be solemnized impliedly prohibit all other marriages, and that a Common Law marriage is void: *McLaughlin's Estate*, 30 Pac. Rep. 651 (1892). Such, also, has been declared to be the law of Oregon: *Holmes* v. *Holmes*, 1 Abb. Cir. Ct. 525 (1870).

The statutes of Pennsylvania, Alabama and Missouri, above referred to, are far more prohibitory in their language than those of Massachusetts, Maryland and West Virginia, yet in the former States the statutes are held to be only directory and not important, while in the latter they are mandatory, and

non-compliance is fatal. When in some States "shall" means "may," and in others "may" means "shall," under exactly the same circumstances, is it not time to seek for some method of correcting this incongruity?

4. A valuable contributor to *Bedford's Monthly*—Mr. Walter Stowe Collins—has recently demonstrated the need of reform in defining the degrees of marriageable kindred. At present many marriages are valid in oneState and incestuous in others. At present two brothers living in the same city on the border line of adjoining States may marry two sisters, in their respective States, and the children of one are legitimate; those of the other not. In one State the parents are honored and respected; in the other both may be condemned as felons. Do such inconsistencies increase our respect for law, either moral or civil? What limit of relationship should be established is open to discussion, but it would seem that at least no relatives nearer than first cousins should be allowed to marry. A painful case recently occurred in Maryland, when a lady and her nephew went to New York to be married, because the law of that State permits it, intending to return and reside in Maryland. But it must be at the risk of criminal prosecution.

Thus, from what has been before said, it will be seen that on three or four very important points in the marriage law a striking difference exists in the various States. It may not be desirable or practicable to establish uniformity in all the details relating to the marriage ceremony, but certainly some improvement in the fundamentals involved is worthy of our best efforts. We ought to aim at unity in essentials, even if we permit variety in non-essentials.

II. As to the Divorce Laws.

As to the causes for divorce. Here the diversity is so great, it seems hopeless to expect entire uniformity, however desirable it may be. We can hardly expect that South Carolina with no legal ground for divorce, will adopt the law of Kentucky with seventeen, nor that Kentucky will abolish all her present divorce laws to conform to South Carolina. Either

some middle ground must be adopted or uniformity is impossible. Neither is it probable that all States will agree to only one cause as sufficient; for only a very few States now limit divorces to cases of adultery. If uniformity here is obtainable at all, it can only be on a few fundamental and clear violations of the marriage law, such as adultery, absolute and wilful desertion, extreme and intolerable cruelty endangering life or health, and perhaps one or two others.

But if uniformity in causes of divorce is unattainable, it seems to be perfectly practical in many other important points in the administration of divorce laws. Thus a uniform law might require a longer *bona fide* residence of the applicant in the State where the application is made. It now varies from five years in Massachusetts to sixty days in one State, unless the time has recently been extended.

Requiring actual notice to the respondent whenever possible, is also a great safeguard against fraud and imposition, which may easily be secured by some more uniform legislation. Authorizing a court to make a decree of divorce (when no notice is actually given to the respondent), to take effect after the lapse of six months, with a power to apply to set it aside within that time, is also a step in the same direction of security for the accused party, and a safeguard against fraud and imposition upon the Court.

These and other considerations lead us to three conclusions:

(1) That more uniformity in the general principles of marriage and divorce laws is essential to our best interests.

(2) That entire uniformity in details, even if practicable, is not absolutely necessary.

(3) That the evils of non-uniformity may, to a great extent, be prevented by appropriate legislation.

III. If Uniformity is Desirable, How Can it be Accomplished?

Only two ways are possible; viz., either by the act of Congress, or by that of the several States.

The first requires an amendment of the Constitution, enlarging the powers of Congress so as to embrace marriage

and divorce in the eighth section. But such an amendment has many difficulties to encounter. In the first place it must, in the language of the Constitution, be "deemed necessary" by two-thirds of both Houses, and be proposed by Congress, or by a convention called by Congress upon the application of the legislatures of two-thirds of the several States. Second, it must be ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as Congress may determine. In order to secure uniformity by this method, two controversies must be waged and two victories won. In the first place, three-fourths of the State legislatures and a majority of both Houses of the national Congress, as also the President of the United States, must be convinced that uniformity, and the proposed uniformity, is in and of itself desirable; in the second place, that it is wise to amend the Constitution, and vest the power of establishing uniformity in the Federal government. Some of the ardent friends of the first proposition are opposed to the last, while many more are lukewarm or doubtful of its expediency. The objection is not without force, that if the control of the subject of marriage and divorce may be wisely transferred to the national Congress, so equally well may many others, such as the law of wills and inheritance, the laws of descent and distribution, etc.

On the other hand, it is easier to persuade forty-four States to establish uniformity by separate action than it is to induce thirty-three States to surrender the whole subject to the control of the Federal government. Besides, much success would be attained in the latter method of individual State action, even if all the States did not at first adopt the uniform legislation. If thirty-three did so, their example, if uniformity proved beneficial, would sooner or later induce the rest to follow in their footsteps.

If, therefore, this problem of uniformity is to be worked out in the several States, how may it be accomplished? One important step looking toward that direction has already been taken. Several States have appointed commissioners to meet together and take this subject into consideration, and propose

some scheme or plan of uniformity in the most important social subjects. They have had several meetings, and have already formulated several propositions looking towards uniformity on this and other subjects. They are waiting for the appointment of commissioners from still other States, with whom they may confer before pressing their recommendations for adoption. If the labors of these commissions shall prove satisfactory, much good will be accomplished in securing uniformity, or at least in remedying the evils arising from non-uniformity; on the other hand, if this effort proves a failure we see no remedy for the constantly increasing evils of our present situation.

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Boston, August 1, 1893.

* This paper having been prepared and read nearly three years since, some changes may have in the meantime been made in the laws of some States, for which the reader will make due allowance.